91-585

No. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

LAWRENCE J. STOCKLER and
PHILLIP J. GOODMAN, Successor
to Rosemarie McLellan, and
Receiver over the assets of
Albert W. Semaan, Petitioners,

v.

CITY OF DETROIT and THE MEDIATION
TRIBUNAL ASSOCIATION, Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

LAW OFFICES OF
LAWRENCE J. STOCKLER
& ASSOCIATES, P.C.

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STATEMENT OF QUESTIONS PRESENTED

I.

EVEN IF THE ADOPTION OF THE MICHIGAN COURT RULES IS "LEGISLATIVE" IN NATURE, ARE THEY "ABOVE AND BEYOND" ATTACK AS VIOLATE OF CONSTITUTIONAL DEFICIENCIES?

II.

SHOULD AN ATTORNEY BE FACED WITH A MALPRACTICE ACTION BY IGNORING A MICHIGAN COURT RULE AND THEN ATTACK IT ON APPEAL?

III.

SHOULD ALTERNATIVE DISPUTE RESOLUTIONS BE VOLUNTARY INSTEAD OF MANDATORY?

IV.

DOES QUALIFIED IMMUNITY PRECLUDE CONSTITUTIONAL ATTACK ON A COURT RULE?

V.

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Petitioners, LAWRENCE J. STOCKLER and PHILLIP J. GOODMAN, Successor to Rosemarie McLellan, and Receiver over the assets of Albert W. Semaan, respectfully request that this Court issue a writ of certiorari to review the Opinion of the Sixth Circuit Court of Appeals filed in the above cause on July 8, 1991 and the Judgment of the Sixth Circuit

Court of Appeals issued as mandate in the above cause on August 1, 1991.

OPINIONS BELOW

Petitioners' Petition for Writ of Certiorari concerns an Opinion by the United States Court of Appeals, Sixth Circuit, dated July 8, 1991 (Appendix A, infra) and Judgment of the United States Court of Appeals, Sixth Circuit, issued as mandate on August 1, 1991 (Appendix B, infra).

The Order and Judgment of the United States District Court for the Eastern District of Michigan (Appendices E and F, respectively, infra) was entered July 3, 1990. The Opinion of the United States Court of Appeals (Appendix A, infra) was filed July 8, 1991. The Judgment of the United States Court of Appeals, Sixth Circuit was issued as mandate on August 1, 1991 (Appendix B, infra).

STATEMENT OF JURISDICTION

The judgment of the United States District Court for the Eastern District of Michigan was entered July 3, 1990. The Opinion of the Sixth Circuit Court of Appeals was entered on July 8, 1991 and the Judgment of the Sixth Circuit Court of Appeals was issued as mandate on August 1, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.

2. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

> presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Eleventh Amendment to the United States constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

4. The Fourteenth Amendment, Sections 1 and 5, of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

5. 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

6. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

> redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

7. The Michigan Constitution of 1963, Article 1, Section 2 provides:

> The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.

8. The Michigan Constitution of 1963, Article III, Section 2 provides:

> The powers of the government are divided into three branches; legislative, executive and judicial. No person exercising powers for one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

STATEMENT OF THE CASE

A legal challenge was made upon the Michigan Supreme Court Justices' adoption of a court rule, M.C.R. 2.403 which is unconstitutional in that the Justices have seized the legislative and executive branches' functions -- ignoring the Michigan Constitution's provisions for separation of powers (Article III, Section 2). The Justices set fees, penalties, and provided for contracts without open bidding -- among other violations of the separation of powers.

The Justices made alternative dispute resolutions (ADR) mandatory -- ignoring the right to trial by jury, §§ 1981 and 1983 provisions (Title 42) of the Civil Rights Act, and every basic rule of law for rule of Justices.

Mandatory mediation is inconsistent with the Seventh Circuit's ruling in Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988) wherein ADR was made voluntary, not mandatory.

The Sixth Circuit's majority opinion in Alias Amanuel Alia et al. v. Michigan Supreme Court, et al., Docket No. 88-2095 (Appendix D) which was heavily relied upon by the opinion of the Sixth Circuit in the instant action (Appendix A) has inconsistent holdings, i.e., qualified immunity versus attack the court rule at state court level with the attorney vulnerable for malpractice. The Sixth Circuit ignored the futile and vain attempts to do this.

Lastly, the Sixth Circuit in Alia, supra held that "legislative" adoption of court rules cannot be challenged -- whereas, we all know that a legislature's adoption of a statute can be attacked. This places a court rule on procedure on a higher plane than substantive law.

In Alia, supra, which was heavily relied upon by the Sixth Circuit, the herein Petitioner, was counsel for Alia and attempted to file a Petition for Writ of

Certiorari with this Court. However, the Petition was rejected as untimely despite the fact that counsel was ill for three months and had an excusable reason. The instant Petitioner was then a one-man law office and around the middle of August, 1990, he became ill with pneumonia, and was not released to come back to work until October 29, 1990. Subsequent to coming back to work, Petitioner was only able to work half days for two weeks, being approximately from October 29, 1990 through November 9, 1990. While Petitioner was out, there was a cash crunch in the office, rent went unpaid, phone bills were delayed and payment and the like, which required immediate attention to bring in money in order to satisfy certain creditors so that the law office could continue to function, and, in addition, so the personnel of the law office could be paid and would not seek employment elsewhere. The Petition for Writ of Certiorari in the Alia case was

immediately worked on upon Petitioner's return, but the Petition was received by the Court on December 10, 1990 after the November 28, 1990 deadline and all copies were returned by the clerk, notwithstanding that it was accompanied by an Application for Extension of Time setting forth good cause for the delay and a doctor's report substantiating counsel's lengthy illness. An Application for Hearing and Consideration, or Rehearing was likewise summarily denied by the Court Clerk.

REASONS FOR GRANTING THE WRIT

Petitioner is attacking the mandatory order of mediation pursuant to the applicable Michigan Court Rules as was adopted by the Michigan Supreme Court through their administrative procedure. See Appendix C, being the Michigan court rule. Petitioner sought declaratory and injunctive relief at the trial court level and also on appeal before the United States Court of Appeals for

the Sixth Circuit which was denied on the basis that the Michigan Supreme Court Justices have legislative immunity for any suit relating to the promulgation of Michigan Court Rule 2.403, citing Abick v. State of Michigan, 803 F.2d 874 (6th Cir. 1986).

I.

EVEN IF THE ADOPTION OF THE MICHIGAN COURT RULES IS "LEGISLATIVE" IN NATURE, THEY ARE NOT "ABOVE AND BEYOND" ATTACK AS VIOLATIVE OF CONSTITUTIONAL DEFICIENCIES.

The Sixth Circuit in this case, in relying upon Alias Amanuel Alia et al. v. Michigan Supreme Court, et al., Docket No. 88-2095, noted that the majority opinion in Alia, held that the Michigan Supreme Court's promulgation of rules of practice and procedure was held to be a legislative activity contrary to an admission against interest of the Michigan Supreme Court that the promulgation of rules of practice is administrative in nature with the United States Court of Appeals for the Sixth Circuit

citing Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). The Sixth Circuit further held that this Court held that when the Supreme Court of Virginia was promulgating court rules, they were acting in a legislative capacity and in fact were "the State's legislators." Id. at 734, 100 S.Ct. at 1975, and as such, the justices were entitled to legislative immunity. Id. Similarly, it was held that the Justices of the Michigan Supreme Court were acting in their legislative capacity and therefore are entitled to legislative immunity.

IF THIS PROPOSITION IS UPHELD AS SOUND AND PROPER BY THIS COURT, THEN IT WOULD BE BOTH ILLOGICAL AND IMPRACTICAL THAT A LEGISLATIVE ENACTMENT CAN BE STRUCK DOWN AS UNCONSTITUTIONAL WHEREAS A COURT RULE ADOPTED "LEGISLATIVELY" MAY NOT BE DECLARED UNCONSTITUTIONAL. SUCH PRONOUNCEMENT BY THE SIXTH CIRCUIT VIOLATES THE SEPARATION OF POWERS AND PLACES THE MICHIGAN SUPREME

COURT'S ADOPTION OF A COURT RULE NO MATTER HOW DESPOTIC, TYRANNICAL OR OPPRESSIVE AT AN UNTENABLE LEVEL WHICH CAN NEVER BE ATTACKED OR DECLARED UNCONSTITUTIONAL DUE TO THE FICTION OF IMMUNITY.

II.

AN ATTORNEY SHOULD NOT BE FACED WITH A MALPRACTICE ACTION BY IGNORING A MICHIGAN COURT RULE AND THEN ATTACK IT ON APPEAL.

The Sixth Circuit in this case obviously ignored the fact that previously in Alias Amanuel Alia et al. v. Michigan Supreme Court, et al., Docket No. 88-2095, the United States Court of Appeals' majority opinion in held (Appendix D, pp. 9-10) that the holding does not mean that the mediation rule is not insulated from attack but, rather, that a state forum instead of a federal one is appropriate and that any party feeling aggrieved by the requirement of mediation need only refuse to participate. The dismissal that would likely result could then be appealed and whatever infirmities are

thought to exist in the rule could be raised and argued. (Appendix D, pp. 9-10) In the instant case, the Court of Appeals expressly held that plaintiffs have been denied due process in state court, the remedy is to seek certiorari to this Court. (Appendix A, p. 24)

THIS POSITION OF THE MAJORITY OPINION OF THE ALIA CASE, WHICH WAS ADOPTED BY THE UNANIMOUS OPINION OF THE SIXTH CIRCUIT IN THE INSTANT ACTION, IS BOTH ILLOGICAL AND IMPRACTICAL IN THAT ANY ATTORNEY THAT WOULD FOLLOW THIS ADVICE OF THE SIXTH CIRCUIT COULD OPEN HIM OR HERSELF TO LEGAL MALPRACTICE AS THERE WOULD BE NO ASSURANCE THAT THE STATE COURT JUSTICES WOULD RULE THAT MEDIATION IS UNCONSTITUTIONAL WHEN THE MICHIGAN SUPREME COURT HAS REFUSED TO RULE ON THIS ISSUE BOTH UNDER ACTUAL APPEALS AS WELL AS BY QUO WARRANTO. See Mills v. Franco Food Equipment Co., 161 Mich. App. 376, 409 N.W.2d 829, reconsideration denied 414 N.W.2d 888 (1988)

and quo warranto attempts by counsel herein. See also the minority opinion in Alias Amanuel Alia et al. v. Michigan Supreme Court, et al., Docket No. 88-2095 in United States Court of Appeals, Sixth Circuit, Appendix D, p. 16.

The dissenting Opinion in Alia, supra, had noted the fact that the Michigan Supreme Court has in fact had before it attacks on the constitutionality of the mediation rule and refused to make a ruling either on cases of appeal or by quo warranto. See Mills, supra. Equity does not require a person to do a vain act when all that can be done has been done.

The Sixth Circuit citing Alia overlooked the fact that the majority opinion in Alia, supra, had an irreconcilable holding when it says at one point at p. 8 of Appendix D, that there is immunity to attack the court, that the court rule is with legislative immunity and then at pp. 9-10 states that the rule

could be attacked through state procedures -- IGNORING THE REPEATED ATTEMPTS TO HAVE THE MICHIGAN SUPREME COURT RULE ON THIS MATTER.

III.

ALTERNATIVE DISPUTE RESOLUTIONS SHOULD BE VOLUNTARY INSTEAD OF MANDATORY.

The unanimous opinion both in the instant case and the majority opinion in Alia, supra, failed to treat the difference between circuits concerning the issue of violation of work product by mandatory mediation, see Hickman v. Taylor 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988) and Fed. R. Civ. P. 26(b)(3), (b)(4)(A)(i), which would also be a violation of 42 U.S.C. §§ 1981 and 1983.

The Sixth Circuit also ignored the fact that the courts in Michigan enforce mediation sanctions which would take the so-called legislative immunity granted to justices out of such protection. See Michigan Court Rule

2.403(O)(1), (2) and (3) regarding sanctions. See also Petterman v. Haverhill Farms, Inc., 125 Mich. App. 30, 335 N.W.2d 710 (1983) and Wood v. DAIIE, 413 Mich. 573, 321 N.W.2d (1982), regarding enforcement of sanctions by the courts of Michigan.

Declaratory relief is to avoid immediate and irreparable harm and an inadequate remedy at law which the Sixth Circuit ignored.

IV.

QUALIFIED IMMUNITY DOES NOT PRECLUDE CONSTITUTIONAL ATTACK ON A COURT RULE.

The Sixth Circuit in this case cited Alia, supra, wherein the majority opinion (Appendix D) pronounced a court rule adoption to be above the constitutional protections afforded a citizen of the United States in that it cannot be declared unconstitutional nor can injunctive relief be pronounced against its enforcement based upon such qualified immunity of the justices no matter how unfettered the authority is to the state

justices to run amuck by adoption of court rules so that the civil rights of the state citizens would be affected without any redress of grievances. See U.S. Constitution, Amendment I, and the 1963 Michigan Constitution, Article I, Section 3, which grants the people the right to petition the government for redress of grievances. Certainly the judicial branch of government is not above this fundamental right -- or is it?

The Mediation Court Rule, as adopted, is given a "holier than thou" or a more "sanctified" status than statutes as enacted by legislative process through regularly elected legislators so as to prevent declaratory injunctive relief from the court rule but yet to allow a statute to be declared unconstitutional. The adoption of the court rule involved herein violates the separation of powers and the State of Michigan Constitution wherein the Justices

have bypassed contractual bidding, set fees, denied parties of a right to trial, and eliminated the necessity or need of the executive (governor) to approve any enacted statute. See the Michigan Constitution, Article III, Section 2 regarding separation of powers.

Immunity plays no role whatsoever in determining whether or not declaratory or injunctive relief ought to be invoked by this Court as concerns a court rule which has the force of law and especially when such court rule violates civil rights and constitutional protections as given to the State of Michigan's citizens.

The minority opinion in Alia (Appendix D, pp. 25-30) did cite certain cases that immunity did not shield the Virginia Court and its chief justice from suit in a case involving court rules to the extent that the justices acted in their enforcement capacities because neither legislative nor

judicial immunity applies when judges act as enforcers of the law and that also prospective relief was properly awarded against the chief justice in his official capacity, citing Supreme Court of Virginia, supra at 737 and Mitchum v. Foster, 407 U.S. 225 (1972), overruled by Rodriguez v. United States, 480 U.S. 422 (1987).

The minority opinion in Alia also discussed Will v. Michigan Department of State Police, 109 S.Ct. 2304 (1989) but ignored footnote 10 where this Court did not preclude the seeking of declaratory or injunctive relief under 42 U.S.C. § 1983 because a state official in his or her official capacity, when sued for injunctive relief, would be a person under 1983 because official capacity actions for prospective relief are not treated as actions against a state. Id. at 2311, n. 10.

This matter may be heard in federal court directly under the Fifth Amendment. Bell v. Hood, 327 U.S. 678, 681-683 (1946).

The United States Court of Appeals for the Sixth Circuit, citing Alia, supra, failed to recognize the harm done to the Petitioner therein who, in one case, was forced to accept mediation or face sanctions and, in another case pending while argument was held before the Court of Appeals, faced sanctions because he could not improve his position, being everything he asked for to pay doctor bills was awarded, but deducted therefrom were attorney fees, so that the Petitioner therein was deprived of his statutory right to attorney fees and interest under the Michigan no fault laws and had to pay his doctor and hospital bills out of his pocket for the amount paid to his attorney. This Court should grant certiorari to avoid the situation where a court rule results in

irreparable harm upon a person as was done to Mr. Alia.

V.

THE SIXTH CIRCUIT SHOULD BE REVERSED.

The Sixth Circuit in this case ignored the minority opinion in Alia, supra which would have ordered the matter on remand to the District Court to investigate and have hearings whether or not there were certain factors involved to grant relief, more particularly whether the immunity that the majority held was in effect would be a nullity based upon whether the Justices in any respect acted in either an administrative capacity or in an enforcement capacity.

The Michigan Justices, by an admission against interest in People v. Booth, 414 Mich. 434, 324 N.W.2d 741, 747 (1982), held that the state's adoption of a court rule is an administrative matter.

Should not this Court at least adopt the minority in Alia, supra, which would have

remanded that case for further consideration as to whether the defenses raised by the Justices were proper when they pled only absolute judicial immunity or the Eleventh Amendment immunity? The minority opinion recognized the fact that there was a conflict between circuits and that the issue of the work product doctrine was ignored by the majority opinion.

RELIEF REQUESTED

The relief sought herein under the Petition for Writ of Certiorari and all writs should be granted by this Honorable Court and that, at best, this matter should be ruled upon by this Court in holding that the mediation court rule is unconstitutional as has been set forth in this Petition or, at worst, that the matter should be remanded to the United States District Court for the taking of evidence; and declare that a court rule promulgated by a state Supreme Court may be declared unconstitutional.

Respectfully Submitted,

LAWRENCE J. STOCKLER
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Dated: October 4, 1991

APPENDIX "A"

NOT FOR PUBLICATION

90-1793

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAWRENCE J. STOCKLER and
PHILLIP J. GOODMAN,

Plaintiffs-Appellants,

v.

On Appeal from the
United States District
for the Eastern District
of Michigan.

CITY OF DETROIT, MEDIATION
TRIBUNAL ASS'N., and KAYE
TERTZAG

Defendants-Appellees.

---/

BEFORE: KEITH and BOGGS, Circuit Judges; and BERTELSMAN, District Judge.

PER CURIAM: Plaintiffs Lawrence J. Stockler ("Stockler") and Phillip J. Goodman ("Goodman") (collectively "plaintiffs") appeal from the July 3, 1990, order dismissing their civil rights against the City of Detroit (the "City"), the Mediation Tribunal Association (the "Association"), and Judge

Kaye Tertzag ("Judge Tertzag") and assessing sanctions against the plaintiffs. For the following reasons, we AFFIRM that dismissal but REVERSE the award of sanctions.

I.

This case is the latest in a series of suits concerning the property rights over the real property and the 18,000 square foot building that was located at 201 East McNichols in the City of Detroit. The property was owned by Albert Semaan ("Semaan"). Stockler is the holder of a lien against the assets of Semaan. Goodman is the receiver of the assets of Semaan. The State of Michigan asserted that it acquired the property is a tax foreclosure sale. On November 27, 1985, the City acquired the property from the State of Michigan. On May 9, 1986, the City took emergency measures under a Detroit ordinance to have the building removed because the building was extensively fire damaged and structurally unsafe.

In the first suit ("Stockler I"), filed in the United States District Court for the Eastern District of Michigan on January 12, 1988, Stockler and Goodman's predecessor alleged that the City did not have proper title to the property. They alleged that the property was still controlled by Goodman, but that the City had improperly claimed the property through a tax foreclosure sale and improperly torn down the building. They further alleged that the demolition of the building violated the Detroit Building Code (the "Code") because they did not receive advance notice of the demolition. The complaint alleged inverse condemnation and pendant state claims of trespass and conversion. The inverse condemnation count alleged that the City's actions constituted a wrongful taking of property without just compensation (the "takings" claims) and without due process of law (the "due process" claim). The City responded that plaintiffs had failed to

allege a cause of action upon which relief could be granted and that the claims were barred for failure to exhaust state statutory remedies and other state remedies. The district court ruled that plaintiffs had failed to pursue adequate state postdeprivation remedies for inverse condemnation and dismissed the case.

Plaintiffs appealed to this court. In an unpublished per curiam opinion, we affirmed the determination of the district court. Stockler v. City of Detroit, No. 88-2203, (6th Cir. Sept. 25, 1989). We held that the takings claim was not actionable if the state had provided an adequate posttaking remedy, following Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Stockler v. City of Detroit, No. 88-2203, at 3. We noted that the Michigan Supreme Court had held that an inverse condemnation action was available in Michigan under the state constitution. Id.

We held that the due process claim was similarly precluded by the opportunity for a state postdeprivation remedy, following the Supreme Court in Parratt v. Taylor, 451 U.S. 527 (1981). See Williamson, 473 U.S. at 195 & n.14, 197.

After our decision in Stockler I, plaintiffs filed suit in Wayne County Circuit Court alleging inverse condemnation, trespass, and conversion (Stockler II). Stockler II progressed through pretrial procedures, including submission of plaintiffs' claims and defenses to a panel of mediators assembled under the auspices of the Mediation Association. Michigan Court Rule 2.403 provides for submission of claims for money damages for evaluation by a panel of three attorneys. The mediators evaluate the value of the claim. If a party rejects the mediators' evaluation, the case proceeds to trial. A rejecting party, however, may be subject to the payment of the other party's costs, in-

cluding attorney fees, unless the verdict is more favorable to the rejecting party than the mediation evaluation. Mich Ct. R. 2.403(O)(1).

Plaintiffs failed to appear at the initial mediation in Stockler II. The claim was resolved in their absence for $10,000. The trial court set aside the initial mediation evaluation at plaintiffs' request. A hearing before a second mediation panel was held on February 28, 1990. This hearing resulted in the mediators unanimously evaluating the case at $0. Plaintiffs again moved to have the mediation evaluation set aside. They argued that the neutral mediator committed error when he raised an issue sua sponte which led to an evaluation of zero worth. Plaintiffs' motion was denied on March 23, 1990.

On May 3, 1990, the instant case was filed in the Eastern District of Michigan (Stockler III). Stockler II was still pending in state court at the time. The case

against the City remained substantially the same as the case in the earlier actions. Plaintiffs further alleged, however, that the conduct of Stockler II indicated that the remedy available in state court was not adequate. Plaintiffs alleged that the Association denied them a right to a fair trial and due process. Plaintiffs' brief also alleges that the mediation system is an unconstitutional delegation of authority by the Michigan Supreme Court. The state trial judge in Stockler II, Judge Tertzag, was also named as a defendant.

On July 28, 1990, Judge Tertzag filed a motion to dismiss the instant action. The Association also filed a motion to dismiss. The district court entered an order dismissing the Association, Judge Tertzag and the City.

On July 17, 1990, plaintiffs filed a timely notice of appeal of this Court. On October 16, 1990, Judge Tertzag was dismissed

from this appeal upon stipulation of the parties.

At oral argument, plaintiffs' counsel informed the Court that during the pendency of this appeal, Stockler II was dismissed from state court after plaintiffs failed to appear on the date of trial. Plaintiffs had informed the state court that their lawyer, a sole practitioner, had another trial on the date Stockler II was scheduled, but a motion for continuance was denied. Plaintiffs filed an emergency appeal with the Michigan Court of Appeals which was denied for lack of merit. Plaintiffs sought to go directly to the Michigan Supreme Court, but were informed that they must seek a rehearing from the Michigan Court of Appeal prior to seeking Michigan Supreme Court review.

II.

A.

In summary, this action is a challenge to the procedures in Stockler II. Plaintiffs

allege that the Stockler II procedures are not an adequate remedy to the allegedly wrongful deprivation of property and, therefore, the loss of the Detroit property was without due process and without just compensation. There are two components to this challenge. The first component argues that the original taking of the property by the City was without due process and that plaintiffs are entitled to compensation. The second component challenges the procedures under which plaintiffs must seek relief for the first component. Plaintiffs concede that they were told by this Court in Stockler I that they must first utilize the state court proceedings for inverse condemnation before they could argue the first component in federal court. That decision was in part based on the conclusion of this Court that the state inverse condemnation proceeding was an adequate postdeprivation remedy for the wrongs alleged in the first component of this

challenge. The second component of plaintiffs' challenge is an allegation that plaintiffs' experience in Stockler II, after our decision in Stockler I, proves that the state proceedings are not an adequate postdeprivation remedy which must be utilized before the first component of the challenge can be brought in federal court.

Plaintiffs did not wait for the completion of Stockler II or to complete an appeal of Stockler II in state court before they urged a federal court to conclude that Michigan's inverse condemnation proceedings are inadequate. Instead, plaintiffs have brought this third action in the middle of the state proceedings for a determination that those incomplete proceedings are inadequate.

This case is complicated by its interwoven procedural history and the convergence of similar doctrines discussing the proper interrelation of the federal and state courts. Our affirmance of dismissal of Stockler I was

based on ripeness. The district court in the instant case, Stockler III, dismissed the action under the doctrine of abstention established in Younger v. Harris, 401 U.S. 37 (1971). The court declined to exercise its jurisdiction to issue a declaratory judgment declaring the case in progress in state court, Stockler II, constitutionally lacking due process. We find the district court properly applied abstention to dismiss the case rather than entertain injunctive or declaratory relief against the Stockler II state proceeding. This was the proper resolution of the request for equitable relief. We also find that dismissal of the challenge for damages -- the challenge alleging the same claims seeking compensation for the Detroit property because of taking without just compensation or due process alleged in Stockler I and Stockler II -- was proper because of ripeness and re judicata.

B.

We review an exercise of Younger abstention de novo. Traughber v. Beauchane, 760 F.2d 673, 676 (6th Cir. 1985). The principles of Younger abstention dictate that federal courts do not unnecessarily interject themselves into state civil or criminal court proceedings by issuing an injunction or declaratory judgment against those proceedings. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-32 (1982); Lamb Enter. Inc. v. Kiroff, 549 F.2d 1052, 1056-57 (6th Cir.), cert. denied, 431 U.S. 968 (1977). Where a party seeks a declaratory judgment or injunction against an ongoing state civil judicial proceeding, Younger abstention is required if the proceedings implicate an important state interest and there is an adequate opportunity in the state proceedings to present the party's federal claims. See Middlesex, 457 U.S. at 432.

1.

Plaintiffs have not argued that the inverse condemnation proceedings in this case do not implicate important state interests. We find that such interests are clearly implicated. Lower courts have held unanimously since 1975 that eminent domain actions implicate important state interests sufficient to require application of the Younger doctrine. Duty Free Shop, Inc. v. Administration de Terrenos, 889 F.2d 1181, 1182 (1st Cir. 1989). An inverse condemnation action is an eminent domain action that takes place after the alleged taking. Thus, the prong of the Younger test that requires an important state interest is met.

2.

Once it is established that important state interests are implicated in a federal action for declaratory judgment against a state judicial proceeding, the only remaining question is whether Stockler has an adequate forum in the state case, Stockler II, to

raise his federal constitutional claims. This question, as part of the Younger analysis, only looks at whether the judicial proceeding would consider the federal claims. Middlesex, 457 U.S. at 435-36. It is distinct from the similar question of adequacy raised in the ripeness analysis. See infra p. 9

Plaintiffs do not dispute that federal constitutional claims can be raised in Michigan state court. The Michigan courts are courts of general jurisdiction which can hear federal claims as well as state claims. See Lester v. Sheriff of Oakland County, 84 Mich.App. 689, 695, 270 N.W.2d 493, 495 (1978); People v. Kamischke, 3 Mich.App. 236, 241, 142 N.W.2d 21, 24 (1966). Thus, the adequate state forum prong is also met.

3.

Younger abstention has an exception which will allow a federal court not to abstain despite meeting the above test if there

is a showing of bad faith, harassment, or some other extraordinary circumstances. Middlesex, 457 U.S. at 435. Plaintiffs do not argue that this exception to Younger applies. In any event, we find no evidence of such extraordinary circumstances. Our review indicates that while it is arguable whether the mediation system attacked in this case denies due process, it does not appear that plaintiffs are being persecuted by the state system. Thus, the exception to Younger does not apply to the instant case.

We conclude that the district court properly dismissed the allegations seeking declaratory judgment. The Michigan state proceedings in Stockler II constituted a judicial proceeding in which Michigan had an important state interest and where plaintiffs could raise their federal claims. The requirements of Younger abstention were, therefore, met and abstention from the declaratory judgment action are required.

C.

Plaintiffs seek in this action not only a declaratory judgment against the state proceeding, but also damages for the property now claimed by, and in part destroyed by, the City. We will therefore clarify our holding in Stockler I which followed the dictates of the United States Supreme Court in Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Where a state has an inverse condemnation procedure that is not facially unavailable or inadequate, a challenge of a state taking under the takings clause is not ripe for federal court review "until [a party] has utilized that procedure . . . ." Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985).

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We interpret the phrase "utilized that procedure" to require not only a filing for relief under the procedure, but completion of

the entire process available for compensation through the final appeal. Part of the state's procedure for inverse condemnation is that it is a state claim for damages which is appealable in the ordinary course of civil litigation appeals. See Hart v. City of Detroit, 416 Mich. 488, 331 N.W.2d 438 (1982) (Michigan inverse condemnation action appealed to the Michigan Supreme Court). Until all appeals have been taken, a federal court cannot know whether the state would provide just compensation.[1] It is this doubt that

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Plaintiffs focus their argument on their claim that the Michigan state procedure for inverse condemnation is inadequate. This claim seems to misunderstand the nature of the ripeness inquiry into the adequacy of the state proceeding. This inquiry is only a facial examination of the procedures established by the state and how they are generally applied. It is without regard to how they are applied in a particular case. The Supreme Court identified this examination specifically as a facial one. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986). Plaintiffs do not dispute that Michigan entertains inverse condemnation

actions. To the extent that their claim can be construed to allege that the inverse condemnation actions are not adequate, we determined in Stockler II that the Michigan procedures were adequate based on Hart v. City of Detroit, 416 Mich. 488, 331 N.W.2d 438 (1982). Stockler I, slip op. at 3. That decision is binding on us under the doctrines of stare decisis and collateral estoppel. See 6th Cir. R. 24(C). Any claims that in practice the procedures have not been applied fairly do not go to whether there is an "available and adequate" remedy but whether the state has justly compensated for any taking that may have occurred. These issues must wait until after the state procedure has been fully "utilized."

We conclude that the damages were properly dismissed. The facial adequacy of state procedures for the purpose of ripeness has already been determined in Stockler I. Under

the doctrine of res judicata, it cannot be reexamined in the instant case.

D.

The district court awarded the Association $500 in attorney fees from plaintiffs as a sanction under Rule 11. Fed. R. Civ. P. 11. We review the decision to award sanctions under Rule 11 for an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2459 (1990). An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. See In re Bendectin Litigation, 857 F.2d 290, 307 (6th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). Upon a full review of the record, we conclude that while this is a close case, it was improper to award fees. While the district court speculated that the complaint was filed to harass, it is clear to us that a reasonable inquiry was conducted and that, to the best of the signer's knowledge, it was well grounded in fact and was

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Fed. R. Civ. P. 11. Rather than resulting from an improper purpose to harass, we are convinced the appeal was an effort out of frustration with perceived unfairness in the state system to seek protection in the federal courts. The federal courts had told the plaintiffs that federal adjudication was unavailable if they had not tried the remedy and, in trying, had proved that they knew all along -- that they could not get a fair hearing in state court. Armed with their new proof, they again sought access to federal court.

We have concluded that a combination of the Younger doctrine and the Williamson and Parratt doctrines does not permit the access plaintiffs seek. Nonetheless, we are convinced that they reasonably pursued their claim, even though we deem it without merit.

III.

Under the dictates of Younger, a federal trial court cannot interfere in a state judicial proceeding unless the criteria of the narrow exception set out in Younger are met. Plaintiffs' recourse is to conduct a full appeal through the state system. If at the conclusion of all appeals plaintiffs are convinced that they have been denied due process or have not been adequately compensated, their remedy for these alleged constitutional violations is to seek certiorari to the United States Supreme Court. See Duty Free Shop, 889 F.2d at 1183. The Supreme Court may grant certiorari and provide federal court adjudication of this dispute. While it is true that the Supreme Court may choose not to grant certiorari, it is also true that the doctrines established by that Court do not permit an alternative short cut to federal court. We, therefore, AFFIRM the dismissal of this case by the Honorable Robert E. DeMascio, Senior United States District Judge

for the Eastern District of Michigan. We, however, REVERSE the award of sanctions.

APPENDIX "B"

NOT FOR PUBLICATION

90-1793

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAWRENCE J. STOCKLER and
PHILLIP J. GOODMAN,

Plaintiffs-Appellants,

v.

On Appeal from the
United States District
for the Eastern District
of Michigan.

CITY OF DETROIT, MEDIATION
TRIBUNAL ASS'N., and KAYE
TERTZAG

Defendants-Appellees.

---/

BEFORE: KEITH and BOGGS, Circuit Judges; and BERTELSMAN, District Judge.

PER CURIAM: Plaintiffs Lawrence J. Stockler ("Stockler") and Phillip J. Goodman ("Goodman") (collectively "plaintiffs") appeal from the July 3, 1990, order dismissing their civil rights against the City of Detroit (the "City"), the Mediation Tribunal Association (the "Association"), and Judge

Kaye Tertzag ("Judge Tertzag") and assessing sanctions against the plaintiffs. For the following reasons, we AFFIRM that dismissal but REVERSE the award of sanctions.

I.

This case is the latest in a series of suits concerning the property rights over the real property and the 18,000 square foot building that was located at 201 East McNichols in the City of Detroit. The property was owned by Albert Semaan ("Semaan"). Stockler is the holder of a lien against the assets of Semaan. Goodman is the receiver of the assets of Semaan. The State of Michigan asserted that it acquired the property is a tax foreclosure sale. On November 27, 1985, the City acquired the property from the State of Michigan. On May 9, 1986, the City took emergency measures under a Detroit ordinance to have the building removed because the building was extensively fire damaged and structurally unsafe.

In the first suit ("Stockler I"), filed in the United States District Court for the Eastern District of Michigan on January 12, 1988, Stockler and Goodman's predecessor alleged that the City did not have proper title to the property. They alleged that the property was still controlled by Goodman, but that the City had improperly claimed the property through a tax foreclosure sale and improperly torn down the building. They further alleged that the demolition of the building violated the Detroit Building Code (the "Code") because they did not receive advance notice of the demolition. The complaint alleged inverse condemnation and pendant state claims of trespass and conversion. The inverse condemnation count alleged that the City's actions constituted a wrongful taking of property without just compensation (the "takings" claims) and without due process of law (the "due process" claim). The City responded that plaintiffs had failed to

allege a cause of action upon which relief could be granted and that the claims were barred for failure to exhaust state statutory remedies and other state remedies. The district court ruled that plaintiffs had failed to pursue adequate state postdeprivation remedies for inverse condemnation and dismissed the case.

Plaintiffs appealed to this court. In an unpublished per curiam opinion, we affirmed the determination of the district court. Stockler v. City of Detroit, No. 88-2203, (6th Cir. Sept. 25, 1989). We held that the takings claim was not actionable if the state had provided an adequate posttaking remedy, following Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Stockler v. City of Detroit, No. 88-2203, at 3. We noted that the Michigan Supreme Court had held that an inverse condemnation action was available in Michigan under the state constitution. Id.

We held that the due process claim was similarly precluded by the opportunity for a state postdeprivation remedy, following the Supreme Court in Parratt v. Taylor, 451 U.S. 527 (1981). See Williamson, 473 U.S. at 195 & n.14, 197.

After our decision in Stockler I, plaintiffs filed suit in Wayne County Circuit Court alleging inverse condemnation, trespass, and conversion (Stockler II). Stockler II progressed through pretrial procedures, including submission of plaintiffs' claims and defenses to a panel of mediators assembled under the auspices of the Mediation Association. Michigan Court Rule 2.403 provides for submission of claims for money damages for evaluation by a panel of three attorneys. The mediators evaluate the value of the claim. If a party rejects the mediators' evaluation, the case proceeds to trial. A rejecting party, however, may be subject to the payment of the other party's costs, in-

cluding attorney fees, unless the verdict is more favorable to the rejecting party than the mediation evaluation. Mich Ct. R. 2.403(O)(1).

Plaintiffs failed to appear at the initial mediation in Stockler II. The claim was resolved in their absence for $10,000. The trial court set aside the initial mediation evaluation at plaintiffs' request. A hearing before a second mediation panel was held on February 28, 1990. This hearing resulted in the mediators unanimously evaluating the case at $0. Plaintiffs again moved to have the mediation evaluation set aside. They argued that the neutral mediator committed error when he raised an issue sua sponte which led to an evaluation of zero worth. Plaintiffs' motion was denied on March 23, 1990.

On May 3, 1990, the instant case was filed in the Eastern District of Michigan (Stockler III). Stockler II was still pending in state court at the time. The case

against the City remained substantially the same as the case in the earlier actions. Plaintiffs further alleged, however, that the conduct of Stockler II indicated that the remedy available in state court was not adequate. Plaintiffs alleged that the Association denied them a right to a fair trial and due process. Plaintiffs' brief also alleges that the mediation system is an unconstitutional delegation of authority by the Michigan Supreme Court. The state trial judge in Stockler II, Judge Tertzag, was also named as a defendant.

On July 28, 1990, Judge Tertzag filed a motion to dismiss the instant action. The Association also filed a motion to dismiss. The district court entered an order dismissing the Association, Judge Tertzag and the City.

On July 17, 1990, plaintiffs filed a timely notice of appeal of this Court. On October 16, 1990, Judge Tertzag was dismissed

from this appeal upon stipulation of the parties.

At oral argument, plaintiffs' counsel informed the Court that during the pendency of this appeal, Stockler II was dismissed from state court after plaintiffs failed to appear on the date of trial. Plaintiffs had informed the state court that their lawyer, a sole practitioner, had another trial on the date Stockler II was scheduled, but a motion for continuance was denied. Plaintiffs filed an emergency appeal with the Michigan Court of Appeals which was denied for lack of merit. Plaintiffs sought to go directly to the Michigan Supreme Court, but were informed that they must seek a rehearing from the Michigan Court of Appeal prior to seeking Michigan Supreme Court review.

II.

A.

In summary, this action is a challenge to the procedures in Stockler II. Plaintiffs

allege that the Stockler II procedures are not an adequate remedy to the allegedly wrongful deprivation of property and, therefore, the loss of the Detroit property was without due process and without just compensation. There are two components to this challenge. The first component argues that the original taking of the property by the City was without due process and that plaintiffs are entitled to compensation. The second component challenges the procedures under which plaintiffs must seek relief for the first component. Plaintiffs concede that they were told by this Court in Stockler I that they must first utilize the state court proceedings for inverse condemnation before they could argue the first component in federal court. That decision was in part based on the conclusion of this Court that the state inverse condemnation proceeding was an adequate postdeprivation remedy for the wrongs alleged in the first component of this

challenge. The second component of plaintiffs' challenge is an allegation that plaintiffs' experience in Stockler II, after our decision in Stockler I, proves that the state proceedings are not an adequate postdeprivation remedy which must be utilized before the first component of the challenge can be brought in federal court.

Plaintiffs did not wait for the completion of Stockler II or to complete an appeal of Stockler II in state court before they urged a federal court to conclude that Michigan's inverse condemnation proceedings are inadequate. Instead, plaintiffs have brought this third action in the middle of the state proceedings for a determination that those incomplete proceedings are inadequate.

This case is complicated by its interwoven procedural history and the convergence of similar doctrines discussing the proper interrelation of the federal and state courts. Our affirmance of dismissal of Stockler I was

based on ripeness. The district court in the instant case, Stockler III, dismissed the action under the doctrine of abstention established in Younger v. Harris, 401 U.S. 37 (1971). The court declined to exercise its jurisdiction to issue a declaratory judgment declaring the case in progress in state court, Stockler II, constitutionally lacking due process. We find the district court properly applied abstention to dismiss the case rather than entertain injunctive or declaratory relief against the Stockler II state proceeding. This was the proper resolution of the request for equitable relief. We also find that dismissal of the challenge for damages -- the challenge alleging the same claims seeking compensation for the Detroit property because of taking without just compensation or due process alleged in Stockler I and Stockler II -- was proper because of ripeness and re judicata.

B.

We review an exercise of Younger abstention de novo. Trauchber v. Beauchane, 760 F.2d 673, 676 (6th Cir. 1985). The principles of Younger abstention dictate that federal courts do not unnecessarily interject themselves into state civil or criminal court proceedings by issuing an injunction or declaratory judgment against those proceedings. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-32 (1982); Lamb Enter. Inc. v. Kiroff, 549 F.2d 1052, 1056-57 (6th Cir.), cert. denied, 431 U.s. 968 (1977). Where a party seeks a declaratory judgment or injunction against an ongoing state civil judicial proceeding, Younger abstention is required if the proceedings implicate an important state interest and there is an adequate opportunity in the state proceedings to present the party's federal claims. See Middlesex, 457 U.S. at 432.

1.

Plaintiffs have not argued that the inverse condemnation proceedings in this case do not implicate important state interests. We find that such interests are clearly implicated. Lower courts have held unanimously since 1975 that eminent domain actions implicate important state interests sufficient to require application of the Younger doctrine. Duty Free Shop, Inc. v. Administration de Terrenos, 889 F.2d 1181, 1182 (1st Cir. 1989). An inverse condemnation action is an eminent domain action that takes place after the alleged taking. Thus, the prong of the Younger test that requires an important state interest is met.

2.

Once it is established that important state interests are implicated in a federal action for declaratory judgment against a state judicial proceeding, the only remaining question is whether Stockler has an adequate forum in the state case, Stockler II, to

raise his federal constitutional claims. This question, as part of the Younger analysis, only looks at whether the judicial proceeding would consider the federal claims. Middlesex, 457 U.S. at 435-36. It is distinct from the similar question of adequacy raised in the ripeness analysis. See infra p. 9

Plaintiffs do not dispute that federal constitutional claims can be raised in Michigan state court. The Michigan courts are courts of general jurisdiction which can hear federal claims as well as state claims. See Lester v. Sheriff of Oakland County, 84 Mich.App. 689, 695, 270 N.W.2d 493, 495 (1978); People v. Kamischke, 3 Mich.App. 236, 241, 142 N.W.2d 21, 24 (1966). Thus, the adequate state forum prong is also met.

3.

Younger abstention has an exception which will allow a federal court not to abstain despite meeting the above test if there

is a showing of bad faith, harassment, or some other extraordinary circumstances. Middlesex, 457 U.S. at 435. Plaintiffs do not argue that this exception to Younger applies. In any event, we find no evidence of such extraordinary circumstances. Our review indicates that while it is arguable whether the mediation system attacked in this case denies due process, it does not appear that plaintiffs are being persecuted by the state system. Thus, the exception to Younger does not apply to the instant case.

We conclude that the district court properly dismissed the allegations seeking declaratory judgment. The Michigan state proceedings in Stockler II constituted a judicial proceeding in which Michigan had an important state interest and where plaintiffs could raise their federal claims. The requirements of Younger abstention were, therefore, met and abstention from the declaratory judgment action are required.

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Plaintiffs seek in this action not only a declaratory judgment against the state proceeding, but also damages for the property now claimed by, and in part destroyed by, the City. We will therefore clarify our holding in Stockler I which followed the dictates of the United States Supreme Court in Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Where a state has an inverse condemnation procedure that is not facially unavailable or inadequate, a challenge of a state taking under the takings clause is not ripe for federal court review "until [a party] has utilized that procedure . . . ." Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985).

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Under the dictates of Younger, a federal trial court cannot interfere in a state judicial proceeding unless the criteria of the narrow exception set out in Younger are met. Plaintiffs' recourse is to conduct a full appeal through the state system. If at the conclusion of all appeals plaintiffs are convinced that they have been denied due process or have not been adequately compensated, their remedy for these alleged constitutional violations is to seek certiorari to the United States Supreme Court. See Duty Free Shop, 889 F.2d at 1183. The Supreme Court may grant certiorari and provide federal court adjudication of this dispute. While it is true that the Supreme Court may choose not to grant certiorari, it is also true that the doctrines established by that Court do not permit an alternative short cut to federal court. We, therefore, AFFIRM the dismissal of this case by the Honorable Robert E. DeMascio, Senior United States District Judge

for the Eastern District of Michigan. We, however, REVERSE the award of sanctions.

Issued as Mandate: August 1, 1991

Costs: None

Filing Fee .....$
Printing .....$
Total .....$

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By: _____
Deputy Clerk

APPENDIX "C"

MICHIGAN COURT RULES OF 1990
RULE 2.403 MEDIATION

(A) Scope and Applicability of Rule.

(1) A court may submit to mediation any civil action in which the relief sought consists of money damages or division of property. However, MCR 3.211 governs mediation of domestic relations actions.

(2) Mediation of tort cases is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178; however, the court may except an action from mediation on motion for good cause shown if it finds that mediation of that action would be inappropriate.

(3) In a probate proceeding, a court may submit one or more requests for relief to mediation if that part of the proceeding meets the requirements of this rule.

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for

mediation by written order no earlier than 9 days after the filing of the answer

(a) on written stipulation by th parties,

(b) on written motion by a party, or

(c) on the judge's own initiative.

(2) Selection of an action for mediation has no effect on the normal progress of the action toward trial.

(C) Objections to Mediation.

(1) To object to mediation, a party must file a written motion to remove from mediation and a notice of hearing of the motion and serve a copy on the attorneys of record and the mediation clerk within 14 days after notice of the order assigning the action to mediation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.

(2) A timely motion must be heard before the case is submitted to mediation.

(D) Mediation Panel.

(1) Except in mediations to which subrule (D)(4) applies, mediation panels shall be composed of 3 persons.

(2) The procedure for selecting mediation panels must be provided by local administrative order, and may set minimum qualifications for mediators.

(3) A judge may be selected as a member of a mediation panel, but may not preside at the trial of any action in which he or she served as a mediator.

(4) In mediations under MCL 600.4901-600.4923; MSA 27A.4901-27A.4923, the following provisions apply:

(a) The parties shall designate the health care professionals who will serve on the mediation panel at least 14 days before the mediation hearing.

(i) The designation shall be filed with the mediation clerk and a copy on each other party.

(ii) The designation must include the address and telephone number of the designated person and must identify that person's field of specialty, if any.

(iii) The designation must be signed by the attorney for the designating party, or by the party, if not represented by an attorney. The signature shall be deemed certification by the person signing that to the best of the signer's information and belief, the designated person is not subject to disqualification under MCR 2.403(E). MCR 2.114 applies to the designation.

(b) Where there is more than one defendant, or of the designated health care professional to appear at the time set forth the hearing, is not grounds for adjournment, and the mediation shall proceed with fewer than five mediators.

(c) Failure of a party to make a timely designation, or of the designated

health care professional to appear at the time set for the hearing, is not grounds for adjournment, and the mediation shall proceed with fewer than five mediators.

(d) In a case in which there is more than one party on the same side, if they fail to file a timely designation they shall be deemed to have waived the right to designate a member of the mediation panel. The designation must be signed by the attorneys for all of the parties on that side. For the purpose of this subrule, third-party defendants shall be considered defendants.

(e) It is the responsibility of the party or parties designating a health care professional as a member of a mediation panel to inform the designated person of the time and place of the mediation hearing and of any infor-

mation that the designated person requires regarding mediation procedure.

(5) A mediator, including a health care professional designated under subrule (D)(4), may not be called as a witness at trial.

(E) Disqualification of Mediators. The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge.

(F) Mediation Clerk. The court shall designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the mediation clerk.

(G) Scheduling Mediation Hearing.

(1) The mediation clerk shall set a time and place for the hearing and send notice to the mediators and the attorneys at least 42 days before the date set. In an action alleging medical malpractice to which MCL 600.4905; MSA 27A.4905 applies, the notice must be sent at least 56 days before the date set.

(2) Adjournments may be granted only for good cause, in accordance with MCR 2.503.

(H) Fees.

(1) Within 14 days after mailing of the notice of the mediation hearing, unless otherwise ordered by the court, each party must send to the mediation clerk a check for $75 made payable in the manner specified in the notice of the mediation hearing. However,

(a) if a judge is a member of the panel, the fee is $50;

(b) in an action alleging medical malpractice to which MCL 600.4905; MSA 27A.4905 applies, the fee is $125, or $100 if a judge is a member of the panel.

The mediation clerk shall arrange payment to the mediators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the mediators than that provided in this subrule.

(2) Only a single fee is required of each party, even where there are counter-claims, cross-claims, or third-party claims.

(3) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the mediators.

(4) In the case of multiple injuries of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the mediation panel will then make separate awards for each claim, which may be individually accepted or rejected.

(5) Fees paid pursuant to subrule (H) shall be refunded to the parties

(a) if the court sets aside the order submitting the case to mediation

or on its own initiative adjourns the me mediation hearing, or

(b) the parties notify the mediation clerk in writing at least 14 days before the mediation hearing of the settlement, dismissal, or entry of judgment disposing of the action, or of an order of adjournment on stipulation or the motion of a party.

In the case of an adjournment, the fees shall not be refunded if the adjournment order sets a new date for mediation. If mediation is rescheduled at a later time, the fee provisions of subrule (H) apply regardless of whether previously paid fees have been refunded. Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) Submission of Documents.

(1) At least 14 days before the hearing, each party shall file with the mediation clerk 3 copies of documents pertaining to the issues to be mediated and 3 copies of a con-

cise summary setting forth that party's factual or legal position on issues presented by the action, and shall serve one copy of the documents and summary on each attorney of record. A copy of a proof of service must be attached to the copies filed with the mediation clerk. In an action alleging medical malpractice to which MCL 600.4905; MSA 27A.4905 applies, 5 copies of the documents must be filed with the mediation clerk.

(2) Failure to file the required materials with the mediation clerk or to serve copies on each attorney of record by the required date subjects the offending attorney or party to a $60 penalty to be paid at the time of the mediation hearing and distributed equally among the mediators. However, a judge who is a member of the panel shall not be paid a portion of the penalty. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(J) Conduct of Hearing.

(1) A party has the right, but is not required, to attend a mediation hearing. If scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the panel by a personal appearance; however, no testimony will be taken or permitted of any party.

(2) The rules of evidence do not apply before the mediation panel. Factual information having a bearing on damages or liability must be supported by documentary evidence, if possible.

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. The mediation panel may request information on applicable insurance policy limits and may inquire about settlement negotiations, unless a party objects. (4) State ments by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding.

(K) Decision.

(1) Within 14 days after the hearing, the panel will make an evaluation and notify the attorney for each party of its evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2) The evaluation must include a separate award as to the plaintiff's claim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

(4) In an action pending in the circuit court, if the evaluation does not exceed the jurisdictional limitation of the district court, the panel shall include with the copy of the evaluation provided to the mediation

clerk a statement as to whether the damages sustained, without regard to questions of liability, exceed the jurisdictional limitation of the district court.

(5) In a tort case to which MCL 600.4915(2); MSA 27A.4915(2) or MCL 600.4963(2); MSA 27A.4963(2) applies, if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation. For the purpose of this rule, an action or defense is "frivolous" if, as to all of a plaintiff's claims or all of a defendant's defenses to liability, at least 1 of the following conditions is met:

(a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

(b) The party had no reasonable basis to believe that the facts underly-

ing that party's legal position were in fact true.

(c) The party's legal position was devoid of arguable legal merit.

(6) In an action alleging medical malpractice practice to which MCL 600.4915; MSA 27A.4915 applies, the evaluation must include a specific finding that

(a) there has been a breach of the applicable standard of care,

(b) there has not been a breach of the applicable standard of care, or

(c) reasonable minds could differ as to whether there has been a breach of the applicable standard of care.

(L) Acceptance or Rejection of Evaluation.

(1) Each party must file a written acceptance or rejection of the panel's evaluation with the mediation clerk within 28 days after service of the panel's evaluation. The failure to file a written acceptance or rejection within 28 days constitutes rejection.

(2) There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the 28-day period, at which time the mediation clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) In mediations involving multiple parties the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if all opposing parties accept. If this limitation is not included in the acceptance, an accepting

party is deemed to have agreed to entry of judgment as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.

(c) If a party make a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in that amount. The judgment shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date of judgment.

(2) In a case involving multiple parties, judgment shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

(N) Proceedings After Rejection.

(1) If all or part of the evaluation of the mediation panel is rejected, the action proceeds to trial in the normal fashion. In a tort action to which MCL 600.4915(2); MSA27A.4915(2) or MCL 600.4963(2); MSA 27A.4963(2) applies, if the evaluation indicates that the panel unanimously found that a party's action or defense as to any other party is frivolous, the following provisions apply:

(a) The party whose action or defense was found to be frivolous shall post a cash or surety bond, pursuant to MCR 3.604, in the amount of $5,000 for each party against whom the action or defense was determined to be frivolous.

(b) The bond must be posted within 56 days after the mediation hearing or at least 14 days before trial, whichever is earlier.

(c) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.

(d) If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous, and enter the default of a defendant whose defense was found to be frivolous. The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.

(e) If judgment is entered against the party who posted the bond, the bond shall be used to pay any costs awarded against that party by the court under any applicable law or court rule. MCR

3.604 applies to proceedings to enforce the bond.

(2) The mediation clerk shall place a copy of the mediation evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.

(3) If the mediation evaluation of an action pending in the circuit court does not exceed the jurisdictional limitation of the district court, the mediation clerk shall inform the trial judge of that fact and of the statement of the mediation panel under subrule (K)(4).

(O) Rejecting Party's Liability for Costs.

(1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to

the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion filed after mediation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evalua-

tion, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

(4) In cases involving multiple parties, the following rules apply:

(a) Except as provided in subrule (O(4)(b), in determining whether the verdict is more favorable to a party than the mediation evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their

joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total mediation evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the mediation evaluation as to that defendant.

(c) In a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2); MSA 27A.6304(1)-(2).

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that,

(a) taking into account both monetary relief, the verdict is not more fa-

vorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7) Costs shall not be awarded if the mediation award was not unanimous.

(8) A request for under this subrule must be filed and served within 28 days after

the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

Amended effective March 1, 1985; amended January 22, 1987 to apply to mediation hearing conducted and removal orders entered on or after April 1, 1987; amended effective October 1, 1987; December 1, 1987; January 1, 1988; March 31, 1990.]

APPENDIX "D"

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 88-2095

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALIAS AMANUEL ALIA,

Plaintiff-Appellant,

and
GEORGE S. MILLS, SR., JOHN F. KAVALICK, HARVEY SCHIRRMACHER and GARY FORSYTHE,

Plaintiffs,

v.

On Appeal from the United States District Court for the Eastern District of Michigan

MICHIGAN SUPREME COURT, DOROTHY COMSTOCK RILEY, CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DENNIS M. ARCHER AND ROBERT P. GRIFFIN, Jointly and severally,

Defendants-Appellees.
_____/

Decided and Filed June 22, 1990

Before: WELLFORD, GUY and BOGGS, Circuit Judges

GUY, Circuit Judge, delivered the opinion of the court. WELLFORD, Circuit Judge, (pp. 8-18) delivered a separate dissenting opinion on the issue of sanctions. BOGGS, Circuit Judge, (p. 19) delivered a separate opinion concurring as to Parts I and II and joining the dissent as to Part III.

GUY, Circuit Judge. Plaintiffs brought this civil rights action alleging that the Michigan Supreme Court exceeded its authority in promulgating a mediation rule. The district court granted defendants' motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b) on the basis that defendants are entitled to eleventh amendment immunity and qualified judicial immunity. The district court also imposed a $500 sanction against plaintiffs' attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure. Plaintiff Alia appeals the dismissal and the

imposition of sanctions. Upon review, we affirm the dismissal, but for reasons somewhat different than those relied upon by the trial court. The order imposing sanctions is reversed, since both Judge Wellford and Judge Boggs have dissented from my view that the sanctions were appropriate.

I.

This federal actions grows out of two separate state lawsuits. In the first lawsuit, plaintiffs Mills, Kavalick, Schirrmacher, and Forsythe filed a civil action in the Wayne County, Michigan, Circuit Court. Pursuant to Wayne County Local Rule 403 governing mediation, plaintiffs' claim was mediated. Plaintiffs filed a rejection of the mediation recommendation, but it was either not received or not timely noted and the mediation evaluation was deemed accepted. Plaintiffs then appealed to the Michigan Court of Appeals, and that court reversed the judgment. Mills v. Franco Food Equip., Inc.,

161 Mich. App. 376, 409 N.W.2d 829 (1987). However, the Michigan Supreme Court reversed the court of appeals and reinstated the judgment. Mills, 429 Mich. 875, 414 N.W.2d 888 (1987). The United States Supreme Court denied certiorari. Mills, 486 U.S. 1033, 108 S.Ct. 2017 (1988). These plaintiffs also filed suit in federal court against the mediation panel. This court held that the members of the mediation panel were entitled to immunity and affirmed the district court's dismissal of the case. Mills v. Killebrew, 765 F.2d 69 (6th Cir. 1985).

In the other lawsuit, plaintiff Alia filed a civil action in Oakland County, Michigan, Circuit Court. Over plaintiff's objection, the circuit court judge ordered that the claim be mediated pursuant to the applicable Oakland County Rules. Following mediation, plaintiff accepted the recommendation of the mediation panel and the parties entered into a settlement agreement. Both

the Oakland County and Wayne County mediation rules were adopted pursuant to authority contained in Michigan Court Rule 2.403, which states in pertinent part:

> (A) Scope and Applicability of Rule.
>
> (1) A court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property. However, MCR 3.211 governs mediation of domestic relations actions.
>
> (2) Mediation of tort cases is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178; how ever, the court may except an action from mediation on motion for good cause shown if it finds that mediation of that action would be inappropriate.

Mich. Stat. Ann. Rules 1.

All five of these plaintiffs then filed a 42 U.S.C. § 1983 action in federal district court against defendants Michigan Supreme Court and its seven justices. Plaintiffs alleged that defendants "violated the plaintiffs' civil rights and rights to equal pro-

tection of the laws" by promulgating Michigan Court Rule 2.403. Plaintiffs sought money damages, attorney fees, and declaratory and injunctive relief. Defendants subsequently filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12, asserting numerous grounds warranting dismissal. The district court, in granting the dismissal, addressed tow of those grounds, namely that defendants were entitled to immunity under the eleventh amendment and were also entitled to qualified judicial immunity. In addition, the district court found that plaintiffs' complaint was "frivolous" and, pursuant to Rule 12, ordered plaintiffs' attorney to pay $500 in sanctions. Plaintiff Alia now appeals the decision of the district court, the remaining four plaintiffs having elected not to appeal.

II.

In Abick v. State of Michigan, 803 F.2d 874 (6th Cir. 1986), we were faced with a similar challenge directed at the justices of

the Michigan Supreme Court. At issue was Michigan Court Rule 2.103 dealing with service of process. In upholding the district court dismissal of the claim, we held:

> [T]he justices of the Michigan Supreme Court[] claim that they have legislative immunity for any suit relating to the promulgation of Michigan Supreme Court Rule 2.103. A provision such as Rule 2.103 relating to service of process is a rule of practice and procedure. See Chovin v. E.I. DuPont De Nemours & Co., 217 F. Supp. 808, 811 (E.D. Mich. 1963); Daniels v. Detroit, Grant Haven & Milwaukee Railway Co., 163 Mich. 468, 473-74, 128 N.W. 797, 806 (1910); Morrison v. Steiner, 32 Ohio St.2d 86, 89, 290 N.E.2d 841, 844 (1972). Article 6, Section 5 of the Michigan Constitution delegates the responsibility of promulgating court rules relating to practice and procedure to the Michigan Supreme Court. If the Michigan Supreme Court promulgates a rule which conflicts with a statute, the rule is followed. Buscaino v. Rhodes, 385 Mich. 474, 479-80, 189 N.W.2d 202, 204-06 (1971); Perin v. Peuler, 373 Mich. 531, 541, 130 N.W.2d 4, 10 (1964). The Michigan Supreme Court's promulgation of rules of practice and procedure is a legislative activity. See Supreme Court of Virginia v. Consumers Union of the Unites States, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); Hirschkop v.

> Snead, 646 F.2d 149, 151 (4th Cir. 1971); In re Oliver, 452 F.2d 111, 114 (7th Cir. 1971). In Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), the Court held that the justices of the Virginia Supreme Court enjoyed legislative immunity for a claim based on the promulgation of a set of rules to govern the Virginia Bar. The Supreme Court held that when promulgating these rules, the justices of the Virginia Supreme Court were acting in a legislative capacity and in fact were "the State's legislators." Id. at 734, 100 S.Ct. at 1975. As such, the justices were entitled to legislative immunity. Id. Similarly, the Justices of the Michigan Supreme Court were acting in their legislative capacity and therefore are entitled to legislative immunity.

803 F.2d at 877-78.

Our ruling in Abick is dispositive of plaintiffs' claim here. The immunity granted is immunity from suit and applies whether the relief sought is money damages or injunctive relief. We also note that we have earlier addressed the specific rule under attack here. Mills, 765 F.2d 69, was a challenge to the mediation rule brought by the same attorney who brings this challenge. Mills was

also dismissed below by the same district judge involved here. The only difference was that Mills involved a suit against the mediators rather than the Michigan Supreme Court. In Mills, we stated:

> Moreover, Mich. Comp. Laws Ann. § 600.223 allows the Michigan Supreme Court "to promulgate and amend general rules governing practices and procedure in the Supreme Court and all other courts of record. . . ." Given those provisions, we do not believe there was any clearly statutory or constitutional proscription against mediation.

Id. at 72. Thus, despite the immunity enjoyed by the Michigan Supreme Court, we have, in dicta at least, addressed the merits of the challenge presented here.

Our holding does not mean that the mediation rule is insulated from attack but, rather, that a state forum instead of a federal one is appropriate. Any party feeling aggrieved by the requirement of mediation need only refuse to participate. The dismissal that would likely result could then be appealed and whatever infirmities are thought

to exist in the rule could be raised and argued.[1]

III.

Plaintiff also asserts on appeal that the district court erred in determining that the complaint was "frivolous" and thereby imposing a $500 sanction upon plaintiff's attorney. Plaintiff asserts that the district court specifically erred in not conducting an inquiry into whether plaintiffs' complaint was well-grounded in fact or warranted by existing law.

A district court's imposition of sanctions pursuant to Rule 11 is reviewed under an abuse of discretion standard. Mihalik v. Pro Arts, Inc., 851 F.2d 790, 793 (6th Cir. 1988); Century Prods., Inc. v. Sutter, 837 F.2d 247, 250 (6th Cir. 1988); INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 401-02 (6th

[1] Arguably, Alia's claim is moot here because he went to mediation, accepted the recommendation, and entered into a settlement agreement.

Cir.), cert. denied, 484 U.S. 927, 108 S. Ct. 291 (1987).

Upon review, it is noted that the district court judge was very familiar with plaintiffs' claim, both from this case and his prior ruling in plaintiffs' counsel's previous case, Mills v. Killebrew. I find no abuse of discretion in the district judge's decision to impose sanctions upon plaintiffs' attorney as signer of the complaint. There can be little doubt that the attorney himself, not the clients, was the engine driving this litigation.

AFFIRMED IN PART AND REVERSED IN PART.

WELLFORD, Circuit Judge, dissenting:

This dispute arose in 1979 when four plaintiffs (hereinafter the "Mills' plaintiffs") filed an action for damages in Wayne County, Michigan Circuit Court against a corporation and two individuals for fraud and deceit. In 1983 the case was ordered to mandatory mediation pursuant to Wayne County

Local Rule 403.[1] The Mediation Board found in favor of the Mills' plaintiffs in the amount of $18,000. Defendants in that suit accepted the Mediation Board's decision. The Mills' plaintiffs objected to the award, however, and allegedly mailed notice of their rejection to the mediation tribunal eleven days before the deadline to reject its decision. The mediation tribunal received the Mills' plaintiffs' notice of rejection one day past the deadline under the specified procedures. The Mills' plaintiffs then moved for a court order requiring the mediation tribunal to accept their late rejection of the mediation award, but the trial court denied the Mills' plaintiffs' motion to this

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[1] Rule 403 states, in part:
Mediation.

(a) Scope and Applicability of Rule. A court may submit to mediation any civil action in which the relief sought consists of money damages or division of property.

This is similar to Michigan Rule 2.403, which is challenged in this complaint.

effect The Mills' plaintiffs then appealed to the Michigan Court of Appeals, which held that the trial court did not abuse its discretion in refusing to set aside the mediation award, finding that the trial court correctly held that the Mills' plaintiffs did not mail a rejection notice.

The Michigan Court of Appeals, however, granted the Mills' plaintiffs' motion for a rehearing, and remanded the case to the trial court for an evidentiary hearing. After a hearing, the trial court against denied plaintiffs' motion for reconsideration, and they appealed again to the Michigan Court of Appeals, and this time, by a divided vote, the court held that the trial court erroneously denied the Mills' plaintiffs' request to set aside the mediation award. On appeal to the Michigan Supreme Court, this latest court of appeals decision was reversed and the 1983 mediation award reinstated.[2]

Alia filed suit in Oakland County Circuit Court sometime in 1987. The suit was apparently brought by Alia against his insurance company to compel them to pay first party benefits arising out of an automobile accident. The trial court judge subsequently ordered the case to mediation. Allegedly distressed that the mediation process would force his attorney to divulge privileged work product, Alia, joined by the Mills' plaintiffs, brought this action on June 17, 1988, against the Michigan Supreme Court and its justices for violations of their civil rights. They alleged both state and federal constitutional violations, violations of 42 U.S.C. §§ 1981 and 1983, and asserted the jurisdictional amount under 28 U.S.C. § 1331. They challenged the Michigan procedure requiring mediation of their state law claims based on mandatory divulging of "privileged

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[2] A motion for reconsideration was denied, and the United States Supreme Court denied a petition for certiorari.

work product" by their attorneys' deprivation of their "day in court," and deprivation of a jury trial by mediation before a three-lawyer panel. In their earlier, separate state court actions, these plaintiffs had sought a jury trial and damages against separate defendants.[3]

Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b) based on claims of (1) Eleventh Amendment immunity; (2) absolute judicial immunity; (3) adequate post-deprivation remedies under Michigan law; and (4) collateral estoppel. Plaintiffs responded by claiming that their suit was against state officials acting "beyond the bounds of federal constitutional authority" and in violation of the Michigan Constitution. The response reminded that plaintiffs claimed a violation of the Michi-

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[3] Alia stated that his separate state court lawsuit, although ordered to mediation as was the Mills' case, is still pending in state court.

gan Constitution for "delegating judicial power without jurisdiction." Plaintiffs also responded that claimed Eleventh Amendment immunity does not bar a suit for declaratory and/or injunctive relief.

Plaintiffs also responded that the court and the individual justices had acted in an administrative capacity, "not adjudicative or judicial" capacity, citing Forrester v. White, 484 U.S. 219 (1988). As to adequacy of state remedies, the attorney for Alia filed copies of a Petition for Redress of Grievances And Quo Warranto: filed with the Michigan Supreme Court in June 1985, which was "assigned administrative status" by Chief Justice G. Mennen Williams in January 1986. The Clerk of the Michigan Supreme Court advised Alia's attorney in April 1986 that the petition which sought repeal of the mediation rule had been submitted to a committee to evaluate the mediation rule. In May 1987, the Clerk advised the attorney, in response

to his inquiry, that the "committee has submitted its report . . . but we still await final action upon that report." No final action on this petition has been indicated.

The district court granted defendants' motion to dismiss on the grounds of Eleventh Amendment immunity with respect to the Michigan Supreme Court, and based on qualified judicial immunity as to the individual justices. Interestingly, defendants' motion to dismiss was based on judicial immunity, not on any claim of immunity.[4] He ordered plaintiffs' attorney to pay the State of Michigan $500 "for expenses incurred" pursuant to Rule

[4] At oral argument before the district court, defendants' attorney raised an "alternative theory, legislative immunity," based upon Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). The district judge had observed "I don't think there is absolute immunity here. I think there is qualified immunity under Harlow v. Fitzgerald, [457 U.S. 800 (1982)]." As to the alternative claim, the district judge stated "I never quite understood that ... Consumers Union speaks to absolute immunity for legislative action, and I don't know which rule applies to administrative actions of Courts. (Emphasis added).

11 because the complaint was not "well-grounded in fact. . . warranted by existing law" or made in good faith. Defendants' attorney, in his argument on the motion to dismiss, pointed to Mills v. Killebrew, 765 F.2d 69 (6th Cir. 1985), in which this court had affirmed the same district court in dismissing an action brought by the Mills' plaintiffs under 42 U.S.C. §§ 1983, 1985, and 1986, which sought damages against the three lawyers who had served on the mediation pane in their case brought in state court under Local Court Rule 405. In Mills, the district court held the mediation panel lawyers to be entitled to "absolute quasi-judicial immunity." 765 F.2d at 69-70. We observed in Mills that "appellants did not object to the order," and that they had also "failed to reject the award within the time period provided by Rule 403.7(e)." Id. at 71.[5] Alia

[5] We observed in Mills, 765 F.2d at 72, that the mediators had "jurisdiction," because "Rule 405 was adopted as a local rule

is in a very different posture than were the Mills' plaintiffs in this respect.

Alia is now the only appellant not the Mills' plaintiffs. In granting defendants' motion to dismiss, the district court relied on Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945), and Hans v. Louisiana, 134 U.S. 1 (1890), in ruling for the Michigan Supreme Court, and on Harlow v. Fitzgerald, 456 U.S. 800 (1982), in ruling for the individual Michigan Supreme Court justices. Despite holding that the defendant court and justices were acting "in an administrative capacity" in promulgating the rule in question, the district court did not discuss Forrester v. White, supra, nor Strandell v. Jackson, 838 F.2d 884 (7th Cir. 1988).

The Supreme Court in Ford Motor Co. held that a tax refund suit brought by Ford in

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with the approval of the Michigan Supreme Court," and that the Michigan Constitution and laws authorized that court to promulgate, "amend and simplify the practice and procedure in all courts."

Indiana for a tax refund against the Indiana Department of the Treasury and its individual chief officials, including the Governor and State Treasurer, "constitutes an action against the State of Indiana." Ford Motor Co., 323 U.S. at 463. It also held that "[w]here relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action. . . ." Id. at 462. In Ford Motor Co., the essence of the action was "recovery of money from the state," which was the "real, substantial party in interest," and thus, Eleventh Amendment immunity did apply. Id. at 464. The nature of the instant complaint is different from Ford Motor Co. in that it challenges, on constitutional grounds, the adoption of state court rules on mediation and seeks essentially equitable relief from the Michigan Supreme Court. Under the authority of Ford Motor Co., how ever,

and Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), the state itself or a state agency or department, such as the Department of the Treasury, or a state-operated institution to care for the mentally retarded may claim immunity in federal court suits. See Employees of Dept. of Health & Welfare of Missouri v. Dept. of Public Health & Welfare of Missouri, 411 U.S. 279 (1973). Hans v. Louisiana, 134 U.S. 1 (189), although the subject of much debate during the past one hundred years, held that "a federal court could not entertain a suit brought by a citizen against his own State." Pennhurst, 465 U.S. at 98. The latter decision pointed out that "Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity," 465 U.S. at 99 (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)), but we are not dealing

with that situation in this case except with respect to the § 1981 and § 1983 claims.[6]

Pennhurst also points out that Eleventh Amendment immunity may apply where the "relief sought nominally against an officer is in fact against the sovereign, if the decree would operate against the latter," id. at 101 (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam)), or if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. . . ." Id. at 101 n.11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)) (citations omitted) (internal quotation marks omitted).

It is uncertain under the above authority whether this suit is against the state itself or a state "agency or department," or whether the State of Michigan is "the real,

[6] Nowhere does Alia set out the basis of his entitlement to claim § 1981 status based on race and alienage. I would uphold the district court's dismissal of Alia's § 1981 claims.

substantial party in interest," or whether the judgment sought by Alia would involve the "public treasury" or "public administration." However, to the extent that Alia seeks money damages against the court or its individual members, I agree that he is barred by the Eleventh Amendment. See Brandon v. Holt, 469 U.S. 464 (1985). In a recent decision of this court in a suit against the State of Michigan, the State Judiciary Council, and individual justices of the Michigan Supreme Court, we held that the Judiciary Council was a state agency and immune from suit "for damages or injunctive relief" under the Eleventh Amendment. Abick v. State of Michigan, 803 F.2d 874, 876 (6th Cir. 1986). In the recent decision of Will v. Michigan Dept. of State Police, 109 S.Ct. 2304 (1989), the Supreme Court held that a suit against state officials in their official capacity seeking monetary damages for violations of 1983 was barred by the Eleventh Amendment because such

a suit was, in fact, a suit against the state. Will, 109 S.Ct at 2312. Thus, Alia's § 1983 claims for monetary damages against the individual justices are barred by the Eleventh Amendment. However, Alia is not precluded by the Eleventh Amendment from seeking declaratory or injunctive relief under § 1983 because "a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official capacity actions for prospective relief are not treated as actions against the State'." Id. at 2311 n.10. Therefore, Alia's § 1983 claims for declaratory and injunctive relief are not barred by the Eleventh Amendment.

Thus, Alia is precluded from suing the Michigan Supreme Court for money damages or injunctive or declaratory relief by virtue of its Eleventh Amendment immunity and that the district court properly dismissed the Michigan Supreme Court entirely from this action.

The individual justices are entitled to Eleventh Amendment immunity to the extent Alia is seeking money damages, but they are not entitled to claim Eleventh Amendment immunity to the extent Alia is seeking injunctive or declaratory relief.[7] This does not end the inquiry, however, because we must still decide whether the individual justices are entitled to legislative, judicial, or qualified immunity.

The justices claim they ar entitled to absolute legislative immunity. In Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), the defendants, who were individual justices of the Virginia Supreme Court, argued belatedly that they were immune from imposition of costs and fees in respect to their rulemaking activity based on "judicial immunity grounds." 446 U.S. at

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[7] However, the Eleventh Amendment is an absolute bar to Alia's claims that the justices violated state law. Pennhurst, 465 U.S. at 89, 103-06 (1984).

729. Later, defendant justices urged "absolute legislative or judicial immunity," id. at 730, and plaintiffs responded that this did not apply in the case where they sought declaratory or injunctive relief. The Supreme Court in Consumers Union, however, allowed the belated assertion and held flatly that "the Virginia Court and its members are immune from suit when acting in their legislative capacity," and held further that they were acting legislatively when rulemaking. Id. at 734. A recent decision of this court, Abick, relying on Consumers Union, held that the Michigan Supreme Court justices were entitled to absolute legislative immunity when engaging in the "promulgation of rules of practice and procedure" because this was a "legislative activity." 803 F.2d at 818. The Supreme Court reminded us, at the same time in Consumers Union, that "we have never held that judicial immunity absolutely insulates judges from declaratory or injunc-

tive relief with respect to their judicial acts." Id. at 735 (emphasis added). By footnote, it added, "§ 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative, or judicial." Id. n.14 (emphasis added) (citing Ex Parte Virginia, 100 U.S. 339, 346 (1880) and Mitchum v. Foster, 407 U.S. 225 (1972), overruled by Rodriguez v. United States, 480 U.S. 522 (1987)). The Court went on to hold that "immunity does not shield the Virginia Court and its chief justices from suit in this case," to the extent they acted in their enforcement capacities, because neither legislative nor judicial immunity apply when judges act as enforcers of the law. Id. at 737. The Court also held that "prospective relief was properly awarded against the chief justice in his official capacity; . . ." Id. at 737 n.16.[8] Thus, to the extent the indi-

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vidual justices acted in a rulemaking capacity, they are entitled to legislative immunity, but to the extent they acted in an enforcement capacity, they are not entitled to claim legislative immunity.

The individual justices also claim they are entitled to absolute judicial immunity. In Forrester v. White, the Supreme Court again revisited a judicial (and legislative) immunity claim in a suit brought by a state judge's "subordinate court employee" for a discriminatory discharge. The Court concluded that "it was the nature of the function performed [by the state judge], not the identity of the actor who performed it" that determined the "outcome" in an "immunity analysis." 484 U.S. at 229. After determining that defendant judge acted in an administrative capacity, not in a "judicial or adju-

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[8] The issue whether the Virginia Supreme Court was a "person" suable under § 1983 was not raised before the United States Supreme Court in Consumers Union and thus was not decided. 446 U.S. at 737.

dicative" capacity, the Court found that he was not entitled to absolute judicial immunity. At the same time, the Court conceded that the judge acting in such administrative capacity could claim a defense of "qualified immunity." Id. at 229, 230. I conclude that the justices are not entitled to absolute judicial immunity, although they may be entitled to the defense of qualified immunity for those acts which are not of a judicial or legislative nature.

The problem in this case, it seems to me, is that the complaint asserted that defendants delegated judicial power without jurisdiction, that they "promulgated an unconstitutional rule," which is in controversy; that they set mediation fees without power to do so; that they mandated sanctions and thereby allegedly denied plaintiff's constitutional rights, including denial of a trial by the jury and the taking of property without due process; and that they inhibited the

right to counsel by requiring the divulging of confidential attorney work product.

To the extent the individual justices promulgated the rules in question, they are entitled to claim legislative immunity, but this does not end the required analysis. See Supreme Court of Virginia v. Consumers Union; Forrester v. White; Will v. Michigan Department of State Police. I would therefore direct a remand for a further analysis by the district court as to whether the individual justices acted in any respect in either an administrative capacity or in an enforcement capacity.

The individual justices did not raise the defense of qualified immunity in the district court, which dismissed the case on this basis sua sponte. I would also remand this case for further consideration by the district court as to whether it can properly consider a defense of qualified immunity, when only absolute judicial immunity or

Eleventh Amendment immunity has been claimed by the individual defendants.

There has been presented in this case a question of mootness in light of the alleged settlement of Alia's underlying claim against the defendant or defendants in the state court action. Settlement of all issues in a pending action on appeal will moot that action. Lake Coal Co. v. Roberts & Schaefer Co., 474 U.S. 120 (1985). The thrust of the action and issues before us, however, relate to rules enacted by defendants which mandate mediation in certain circumstances. The settlement in state court, if accomplished, does not settle the issues presented in this appeal. The case is therefore not moot.

Plaintiff Alia objected throughout state proceedings to the requirement of involuntary mediation by a panel of three lawyers in alleged derogation of his right to a jury trial and to his right to a confidential attorney-client relationship. A similar issue was

presented to the Seventh Circuit in Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988), which held that mandating a summary jury trial under state procedure "would also affect seriously the well-established rules concerning discovery and work-product privilege." 838 F.2d at 888. Plaintiff's claims against defendants include this particular assertion. In light of the foregoing discussions, I would reverse the district court's assessment of $500 in sanctions. Plaintiff's claims were neither unfounded, baseless, nor made in bad faith. The claims, on the other hand, involve difficult and complex issues and were in no sense frivolous.

BOGGS, Circuit Judge, concurring in part and dissenting in part. I concur in Parts I and II of Judge Guy's opinion and would affirm the dismissal; however, I dissent from Part III, believing, as does Judge Wellford, that the imposition of sanctions was inappropriate.

APPENDIX "E"

Civ. #90CV71247DT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAWRENCE J. STOCKLER, et al.,

Plaintiffs,

Civil No. 90CV71247DT

v.

Hon. Robert E. DeMascio

CITY OF DETROIT, et al.,

Defendants.
_____/

ORDER

Civ. #90CV71247DT

ORDER

This action is a companion case to Stockler v. City of Detroit, #88CV70110DT. In that case, plaintiffs alleged that the City of Detroit demolished a building without having title or giving proper notice. Plaintiffs alleged that the city's actions constituted a taking in violation of the fifth and fourteenth amendment. We dismissed that complaint since an adequate post deprivation remedy existed in the state courts and plaintiffs failed to pursue those state remedies. This dismissal was affirmed. Plaintiffs then commenced their action against the city in state court, based upon the same allegations. Although the state court action is pending, plaintiffs filed the instant action. In addition to raising identical allegations against the city, plaintiffs name as defendants Judge Tertzag, who is presiding over the state case, and the Mediation Tribunal Association. This matter is before the court

on defendant Tribunal's motion to dismiss or for summary judgment. For the reasons stated herein, defendant Tribunal's motion to dismiss is granted, and we find that plaintiffs' claims against the city and Judge Tertzag must be dismissed as well.

Plaintiffs seek a declaratory judgment from the court decreeing that they "cannot receive a fair trial or procedural due process in state court" Specifically, plaintiffs allege that defendant Tribunal has been unconstitutionally delegated authority to mediate cases pending before the court, that the Tribunal has incompetent mediators, and that Judge Tertzag has so confused the issues plaintiffs no longer know what they must prove. We abstain from exercising jurisdiction since plaintiffs have an opportunity for review of their constitutional claims during or after the state proceeding. See Middlesex Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982). Plaintiffs

are seeking to enjoin or otherwise interfere with a pending state case. "[A]bsent extraordinary circumstances" federal courts "must abstain from granting declaratory or injunctive relief because doing so would involve unduly intrusive interference with, and monitoring of, the day-to-day conduct of state hearings and trials." Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984). Plaintiffs do not lack an adequate state remedy. They could move the state court to set aside the mediation award. Plaintiffs also have state appellate remedies for their complaints as to the mediation procedure and Judge Tertzag's rulings. Alia v. Mills, 88-2095 (6th Cir. 6/22/90) (LEXIS, Genfed lib, 6th files). Thus, we decline to exercise jurisdiction over the claims against the defendants Tribunal and Tertzag. Further, because the state proceedings are still pending, plaintiffs have failed to exhaust their state remedies against the city. Accordingly, the

claims against the city must be dismissed. Four Seasons Apartments v. City of Mayfield Heights, 775 F.2d 150 (8th Cir. 1985).

Defendant Tribunal requests that the court impose sanctions under Fed.R.Civ.P. 11. We find that plaintiffs' counsel did not make a reasonable prefiling inquiry; counsel knew or should have known his complaint was of dubious merit. Moreover, it is clear that plaintiffs are attempting to abuse our jurisdiction by commencing this action while the state court action is still pending. After reading the order of dismissal and the Sixth Circuit's order in the companion case, plaintiffs certainly knew they had to exhaust their state remedies. Plaintiffs only allegation of inadequate state remedies are that they are being "stonewalled" in state court. There is no evidence to support this allegation, which creates an inference that the present action, obviously lacking in merit, may have been commenced for purposes of ha-

rassment. Such an abuse of the legal process is clearly in violation of Rule 11. A sanction of $500 appears to be reasonable to compensate defendant Tribunal for the time and resources expended in defending against this action.

Accordingly, the motion to dismiss or for summary judgment filed by defendant Mediation Tribunal will be granted, attorney fees in the amount of $500 will be awarded to defendant Tribunal, and the claims against the City of Detroit and Judge Tertzag will be dismissed.

IT IS SO ORDERED.

JUL 03 1990

A TRUE COPY

Robert E. DeMascio
Senior United States
District Judge

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAWRENCE J. STOCKLER, et al.,

Plaintiffs,

Civil No. 90CV71247DT

v.

Hon. Robert E. DeMascio

CITY OF DETROIT, et al.,

Defendants.
_____/

JUDGMENT

Defendant Mediation Tribunal having filed a motion to dismiss or for summary judgment, and the court having filed its Order,

NOW, THEREFORE IT IS ORDERED AND ADJUDGED that defendant Tribunal's motion be and the same hereby is GRANTED;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' counsel pay defendant Tribunal the sum of $500 in attorney fees;

IT IS FURTHER ORDERED AND ADJUDGED that the claims against defendants Tertzag

and the City of Detroit be and the same hereby are DISMISSED, pursuant to Fed.R.Civ.P. 12(b)(6).

A TRUE COPY

Robert E. DeMascio
Senior United States
District Judge

Dated: JUL 03 1990